IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Appellant,

vs.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Appellee.

No. 2693

Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division.

MOTION FOR REHEARING.

TURNER & GERAGHTY,

Attorneys for Appellee.

McKee Printing Co., Spokane, Wash.

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Comes now the Appellee and petitions the Court for a re-hearing in the above entitled cause and bases its petition on the following grounds:

First. This case was not argued orally, and it is evident that appellee's position has been misunder-

stood by the court and that undue effect has been given appellee's discussion of the question of certainty in the contract, in the determination by the court of another and entirely different question. The opinion declares:

"According to the express admissions made in the brief of the learned counsel for the appellee, the determination of the question as to whether the appellant could lawfully acquire any of the property was by the contract, vested solely in the appellant."

We can see how the court, considering the case without the aid of oral argument, could be led into the erroneous view above indicated, but that it was most grievously erroneous we shall now proceed to demonstrate.

In the first place, neither in the court below nor in this court, was there any predicate in the pleadings for the contention that discretion was vested in the appellant to reject the contract on the ground that it could not lawfully acquire the property. The answer, paragraph two, p. 21 Record, sets up affirmatively the defense that the title to the properties was not acceptable to appellant's attorneys and that appellant had so advised the appellee, but not the defense that the attorneys had any discretion to determine that appellant could not lawfully acquire the properties. The succeeding paragraphs, three, four, five and six, set up the nature of appellant's business, and the nature and character of the property and business of appellee, and also a history of appellant's litigation with the govern-

ment in the District Court of Oregon, and concluded in paragraph six: "And this defendant further alleges that the sale of the property referred to in said paper writing, or any part thereof, by the plaintiff to the defendant, would be in violation of the anti-trust laws of the United States, and especially of that certain act of Congress entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies,' being the Act of July 2, 1890, commonly known as the Sherman anti-trust act, in that the same would be in restraint of trade or commerce in telephonic communication between the state of Washington and the state of Idaho, and would tend to monopolize such commerce, and would also be in violation of the decree in the suit brought by the United States government against this defendant and others hereinbefore referred to and the said paper writing is void and unenforceable under the provisions of said statute."

It will be seen that the validity of the contract was thus put in issue but no where was there a suggestion that the contract provided or intended that the appellee should be at the mercy of the appellant in the determination of the question of the validity of the contract. The case was tried in the lower court without any such suggestion written or oral. No such suggestion was noticed in the opinion of the trial judge.

In the assignment of errors in this court no suggestion was made that the court below erred in not giving effect to the determination by appellant of its

want of power to purchase the properties. The fourth assignment takes the position that the court erred in not giving effect to the rejection of title by appellant's attorneys, but that is all.

Now while it is true that the brief of the appellant, p. 41, declared it to be the "clear intent of this letter (the letter by McFarland offering to purchase) that the legal questions involved should be passed upon by the attorneys for the appellant and that this 'gentleman's agreement' should not be brought into court * * * but that the question as to what they might lawfully acquire was to be left to and determined by the attorneys for the appellant after they had had sufficient opportunity to investigate the matter," the proposition was so destitute of reason or logic to support it, and so much in the air in the matter of averment in the pleadings on which to plant it either in this court or in the court below, that appellee did not conceive it necessary to dwell on the matter at any length. It required only a reading of McFarland's letter to show that no such right as claimed had been reserved to the appellant. Moreover, if any such right had been attempted to be reserved, there is no authority for extending the doctrine concerning the effect of an attorney's determination of title, to the determination of other questions clearly belonging to the courts, such as the validity or invalidity of contracts.

We now come to the supposed admissions in appellee's brief to the effect that "the determination of the

question whether the appellant could lawfully acquire any of the property, was by the contract vested solely in the appellant."

The supposed admissions are found in a discussion of the question, "was the contract sufficiently certain to warrant specific performance?" In the discussion of that question, the brief pointed out, p. 8 and 9, that all the lines of appellee were innocuous to objection because not competing with any line or lines of appellant except a toll line forty miles long extending from Davenport to Spokane, and then continued: "To the extent that the latter line did an interstate business, the appellant, if it was honest in its offer of purchase and ever intended to carry it out, may have thought that that particular part of appellant's line was an interstate competitor with it, and that it had no right to purchase that particular part of appellant's lines. Hence the offer of the reproduction value of the entire system for such portion thereof as appellant might lawfully acquire." The statements quoted from appellee's brief by the court are to be construed in the light of the fact thus pointed out. Counsel was not considering the right of appellant to decline to take *any* of the property. He was considering its right to take the whole or only a part, as it might determine. And he was considering that, not as measuring any substantive right of the appellant but as fixing the certainty of the contract for the purposes of specific performance. We beg the court to read again the extracts from appellee's brief quoted by it, in the light of this explanation, and

find if it can the adimssion that the right was vested in the appellant to determine whether it could lawfully acquire *any* of the property. Is it to be found in the declaration, "it could take all the properties if it thought such a purchase innocuous to the law. If it doubted its right to purchase all, it could take any part that it conceived it had a right to take." Is that a declaration that appellant might refuse to take *any* of the properties? "The contract stood for all or a part as the appellant might determine." Is that a declaration that the contract stood for all or *none* as the appellant might determine?

The meaning of the discussion in the brief is very clearly shown, it seems to appellee, by what was said about the course open to the court in the trial of the case. "It could have required the appellant to elect whether it would take *all or only part of the property.*" "It could go on and determine for itself whether appellant might lawfully acquire *all* or only a *portion,* of the property." Nowhere in any part of the brief quoted by the court, or in any other part of the brief, we respectfully insist, is there an admission or declaration or the slightest hint or intimtaion, that the appellant had a right to determine for itself that it could not lawfully acquire *any* of the property. That it might lawfully acquire some of the property, and that it was obligated to take some, although it might not be permitted by the law to take all, was the predicate upon which the entire argument of appellee proceeded.

Besides all this, the express declarations of the brief negatived any such import as that given the brief by this court. On p. 4, it was said: "It was not a matter to be determined by the preconceived view of attorneys on either side, as suggested by appellant, because the legal rights of suitors are not foreclosed in that manner."

On p. 28 and 29, we said: "The most amazing position of all advanced by appellant in this connection is that 'it was the clear intent of this letter (the offer of purchase) that the legal questions involved should be passed on by the attorneys for the appellant,' and that the 'gentlemen's agreement' should not be brought into court.' Inasmuch as no attempt is made to support the proposition by reason or authority we will take up no time in discussing it," etc.

We conceive that it is unnecessary to say more to convince the court that it has seriously misapprehended the position of the appellee on this branch of the case.

Second. On the subject of the rejection of title by the attorneys, we beg most respectfully to insist that the court was in error in saying that the evidence failed to show "any bad faith, or arbitrary or capricious action in that regard but that the rejection of the title by the attorneys for the appellant was based upon defects which were clearly debatable, and, at least, not free from doubt."

The record shows that Mr. West, the President of

the appellee, supposing that appellant was acting in good faith, consulted with and relied upon the attorneys of the appellant up to the time of Mr. McFarland's letter of December 15th, 1914, declining to carry out the contract (Plaintiff's exhibit 14), and that he and they acted together in the effort to clear up a number of minor defects in the title suggested by the attorneys. But that the attorneys ever pointed out any but minor and curable defect to him is nowhere shown. It is true that Mr. Avery in his testimony, pp. 94 to 101, pointed out what he considered defects in the foreclosure proceeding as well as those in the bankruptcy proceeding, but his testimony went to the question of marketably title in fact, an issue before the court, and not to any defects in title pointed out by him or his firm to the appellee.

Mr. McFarland's letter is the only communication oral or written ever received by the appellee, pointing out any reason why the appellant declined to go on with the contract. The record is short and the court can verify this statement without much labor.

Now, looking at Mr. McFarland's letter (Record pp. 30 and 31), we see that he informed Mr. West that the company had been advised by Messrs. Post, Avery & Higgins that they could "not approve the title to that portion of the property of the Davenport Company affected by the bankruptcy proceedings of the Washington Consolidated Company," etc. No other objection to the title was suggested. The objection then on

the score of title was confined to the bankruptcy proceedings, and while Mr. McFarland's letter fails to show what the objections were, Mr. Avery described them in his testimony. (Record pp. 98 and 99.) He said: "My objection to the bankruptcy proceeding was I thought that the stipulation of the petitioning creditors and the alleged bankrupt, that the proceedings might be dismissed, prevented any further action by the court." The stipulation of dismissal referred to was after the adjudication of bankruptcy, and, therefore, at a time when the rights of all the world had attached. We feel that the court must have overlooked that fact when it stated in its opinion that the action of appellant's attorneys "was based upon defects which were clearly debatable, and at least, not free from doubt," or if that be not true, that it was misled by the clamor of appellant's brief, wholly without order or system, and therefore liable to mislead, into the belief that other objections to the title than those arising out of the bankruptcy proceeding had been urged or raised. Mr. Avery made one other criticism of the bankruptcy proceeding, namely, that the property of the bankrupt had not been sufficiently described, but his criticism hardly amounted to an objection. He said: "I would not like to say I thought the geenral description of the property would render void an order of the Referee in Bankruptcy made at a later period ordering the sale of all the property, but I thought it rather defective." (Record pp. 98 and 99.)

We accept for the purposes of this petition the law as laid down in the opinion of the court, namely, that the action of appellant's attorneys in rejecting the title was conclusive in this case, unless that action was in bad faith or arbitrary or capricious. We assume, however, if the defects held up by the attorneys were clearly so frivolous as to be not debatable, and that their invalidity was absolutely free from doubt to the apprehension of any fairly well informed member of the bar, that then the court ought to have no difficulty in finding that the objections if not made in bad faith, were at least arbitrary and capricious. We cannot conceive any well informed lawyer advising a client that a stipulation for dismissal of bankruptcy proceedings, between a bankrupt and certain of his creditors, made after an adjudication of bankruptcy, could have any effect in preventing the case proceeding to an orderly conclusion.

The conclusion to be drawn from the patent invalidity of the objection taken by the attorneys, is fortified by other features of this case. There is no doubt that the attorneys for appellant lent themselves to their client in the effort to rid it of a bad bargain. At a time when Mr. West had no attorney of his own, and was relying on the friendly advice of appellant's attorneys, they told him the letters between him and McFarland constituted no contract on the general principles of law; that if they constituted a contract it was without consideration, and, moreover that it was contrary to the anti-trust laws of

the United States and was likely to land him in jail. (Testimony of A. T. West, record p. 76.) We submit that these statements were so untenable from a legal standpoint, at least those relating to the want of consideration, and to the effect of letters such as had passed between the parties, that no legal firm of the standing of Post, Avery & Higgins can be thought to have believed them. If that be true, then their action with respect to title must be rejected from start to finish. They were simply aiding their client to avoid a contract it did not wish to carry out, and were acting to that end arbitrarily, capriciously and in bad faith.

Third. The court did not notice in its opinion a point made in the brief of appellee which we think worthy of serious consideration, namely, that appellant never, as matter of fact, made any objection to title, but predicated its refusal to proceed on its want of power to purchase the property under the proivsions of the Sherman anti-trust law. The letter of Mr. McFarland, after setting out the advice of Post, Avery & Higgins, with respect to supposed defects in the bankruptcy proceeding, continued: "These defects must be cured before the title can be considered good. Further investigation on our part, even in the light of the suggestions contained in yours of the 6th inst., confirms the opinion expressed to you in Spokane, that there is no way in which the Pacific Company can lawfully acquire any portion of the property of the Davenport Company. Our legal department has been over the

entire matter and absolutely refuses to sanction the acquisition by this company of any property unless its right to acquire it is clear." It is impossible to give this letter an interpretation which makes it stand on any defect or defects in the matter of title. On the contrary, it refers to the supposed defects in title as something capable of being cured. But it says, we can't proceed without violating the anti-trust laws of the United States, and we refuse to go further for that reason. After this letter there was no incentive for Mr. West to endeavor to cure the supposed defects in the title. The appellant was refusing to proceed on another ground. Its letter said in effect, "our attorneys have brought to our attention defects in the title. They are, however, defects that can be cured. But there is another objection which cannot be cured. We can't consummate the purchase without violating the laws of the United States and we refuse to proceed for that reason." In this posture of the case there was nothing for the appellee to do but to join issue with appellant on the validity of the contract in an action for damages or for specific perfermance. It did the latter and is now turned out of court on the untenable ground that the attorneys of appellant rejected this title.

Fourth. We cannot but feel that the appellee has been prejudiced in the eyes of this court by the disingenuous attempt of the appellant, pages 38, 39 and 40 of its brief, to create the belief that Mr. West had coerced the appellant by some kind of duress into making the

offer to purchase his properties. All that appellant says in that connection is utterly unsupported by the evidence, except the inference attempted to be drawn from the letter of West to Kingsbury in which the former stated that the transaction "was left largely in the nature of a gentlemen's agreement, with your assurance that it would be carried out." Much is made of that expression as indicating some kind of mala fides on the part of West. It merely indicates, however, what the evidence shows, that West, not having then been advised by counsel of his own, and placing confidence in the insidious advice of the attorneys for appellant, believed that the letters passing between McFarland and himself constituted no contract, and that he was endeavoring, notwithstanding that fact, to hold the appellant up to the honorable agreement, "gentlemen's agreement," which they did clearly evidence. The mala fides in this case is all on the part of appellant. It desired to cozen and deceive the City Council of Spokane and with a view of ridding itself of the opposition of West,whose personal interests were involved in resisting its attempts on the public, made its contract with the latter to purchase his properties. Having by that means accomplished its principal purpose it then commenced its inequitable effort to cozen and defeat West. It has nearly accomplished the latter purpose,

and will have done so completely, if this court does not re-open this case and listen to an argument that presents the merits fully and understandingly.

Respectfully submitted,
TURNER & GERAGHTY,
Attorneys for the Appellee.

George Turner, one of the counsel for the appellee in the above entitled cause, hereby certifies that in his opinion the above and foregoing petition for re-hearing is well founded and that the same is not interposed for delay.

Dated at Spokane Washington November 20, 1916.

George Turner

Of Counsel for Appellee.